United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re Geo Contractors, Inc.

Bankruptcy No. 98 B 39931

Adversary Caption: Sheldon Solow, Trustee v. George Kachavos

Adversary No. 00 A 00556

Date of Issuance: December 5, 2000

Judge: John H. Squires

Appearance of Counsel:

Attorney for Plaintiff: David T. B. Audley, Esq., Chapman and Cutler, 111 West Monroe Street, Chicago, IL 60603

Attorney for Defendant: Richard J. Grossman, Esq., Steinberg, Burtker & Grossman, Ltd., 55 East Monroe Street, Suite 2920, Chicago, IL 60603

Trustee: Sheldon L. Solow, Esq., Hopkins & Sutter, Three First National Plaza, Suite 4100, Chicago, IL 60602

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
GEO CONTRACTORS, INC.,	)	
	)	Chapter 7
Debtor.	)	Bankruptcy No. 98 B 39931
	)	Judge John H. Squires
	)	
SHELDON SOLOW, TRUSTEE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary No. 00 A 00556
	)	
GEORGE KACHAVOS,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

These matters come before the Court on the motions of the defendant George Kachavos (the "Defendant") to dismiss Count II of the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) and for summary judgment on Count I of the complaint pursuant to Federal Rule of Civil Procedure 56, and on the motion of Sheldon Solow, the Chapter 7 case trustee (the "Trustee") for leave to file an amended complaint. For the reasons set forth herein, the Court grants the motion to dismiss Count II of the complaint and grants the motion for summary judgment on Count I of the complaint. In addition, the Court grants the Trustee's motion for leave to file an amended complaint with respect to Count II within fourteen days hereof. The Defendant shall file an answer to the amended complaint fourteen days thereafter. This adversary proceeding is set for status on January 9, 2001 at 10 :00 a.m.

I. JURISDICTION AND PROCEDURE

The Court has jurisdiction to entertain these matters pursuant to 28 U.S.C. § 1334 and Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois. They are core proceedings under 28 U.S.C. § 157(b)(2)(A), (F), (H) and (O).

II. FACTS AND BACKGROUND

On June 20, 2000, the Trustee filed a two-count complaint against the Defendant. Count I of the complaint alleges that in December 1997, Geo Contractors, Inc. (the "Debtor") transferred the sum of $94,788.97 to the Defendant, who is the father of Nicholas and William Kachavos, the sole owners and officers of the Debtor, allegedly for the payment of an antecedent debt owed to the Defendant. The Trustee contends that the payment constitutes a preferential transfer to an insider that may be avoided under 11 U.S.C. § 547(b).

In Count II of the complaint, the Trustee contends that the transfer in the above-referenced sum constitutes a fraudulent conveyance avoidable under 11 U.S.C. § 544(b) and under the Illinois version of the Uniform Fraudulent Conveyance Act, 740 ILCS 160/1 et seq. (the "UFTA").

On October 20, 2000, the Defendant filed the instant motions to dismiss Count II of the complaint and for summary judgment under Count I of the complaint. In the motion for summary judgment, the Defendant contends that the transfer from the Debtor to the Defendant occurred on December 5, 1997, not within the insider preference period one year

before the filing of the bankruptcy petition, which was on December 11, 1998. Thus, the Defendant contends that the Trustee is unable to demonstrate that the transfer constitutes a preferential transfer under § 547(b), and he is entitled to summary judgment in his favor. With respect to the motion to dismiss Count II, the Defendant argues that the Trustee failed to state a cause of action against the Defendant. The Defendant contends that the Trustee did not allege a single element of a cause of action under 740 ILCS 160/1.

On November 22, 2000, the Trustee filed a motion for leave to file an amended complaint. The Trustee states that he does not contest that the transfer took place more than one year prior to the filing of the petition. Consequently, the Trustee seeks to voluntarily withdraw Count I of the complaint. With respect to Count II, however, the Trustee contends that the documents filed in support of the Defendant's motion for summary judgment reinforces the fraudulent conveyance claim. He seeks to amend his complaint on this Count.

III. DISCUSSION

A. Motion for Summary Judgment

In order to prevail on a motion for summary judgment, the movant must meet the statutory criteria set forth in Rule 56 of the Federal Rules of Civil Procedure, made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7056. Rule 56(c) reads in part:

> [T]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show

> that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). See also Dugan v. Smerwick Sewerage Co., 142 F.3d 398, 402 (7th Cir. 1998). The primary purpose for granting a summary judgment motion is to avoid unnecessary trials when there is no genuine issue of material fact in dispute. Trautvetter v. Quick, 916 F.2d 1140, 1147 (7th Cir. 1990); Farries v. Stanadyne/Chicago Div., 832 F.2d 374, 378 (7th Cir. 1987) (quoting Wainwright Bank & Trust Co. v. Railroadmen's Federal Sav. & Loan Ass'n of Indianapolis, 806 F.2d 146, 149 (7th Cir. 1986)). Where the material facts are not in dispute, the sole issue is whether the moving party is entitled to a judgment as a matter of law. ANR Advance Transp. Co. v. International Bhd. of Teamsters, Local 710, 153 F.3d 774, 777 (7th Cir. 1998).

In 1986, the United States Supreme Court decided a trilogy of cases which encourage the use of summary judgment as a means to dispose of factually unsupported claims. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The burden is on the moving party to show that no genuine issue of material fact is in dispute. Anderson, 477 U.S. at 248; Matsushita, 475 U.S. at 585-86; Celotex, 477 U.S. at 322.

All reasonable inferences drawn from the underlying facts must be viewed in a light most favorable to the party opposing the motion. Parkins v. Civil Constructors of Ill., Inc., 163 F.3d 1027, 1032 (7th Cir. 1998). The existence of a material factual dispute is sufficient

only if the disputed fact is determinative of the outcome under applicable law. Anderson, 477 U.S. at 248; Frey v. Fraser Yachts, 29 F.3d 1153, 1156 (7th Cir. 1994). "Summary judgment is not an appropriate occasion for weighing the evidence; rather the inquiry is limited to determining if there is a genuine issue for trial." Lohorn v. Michal, 913 F.2d 327, 331 (7th Cir. 1990).

Local Rule 402.M of the Bankruptcy Rules adopted for the Northern District of Illinois requires the party moving for summary judgment to file a detailed statement ("402.M statement") of material facts that the movant believes are uncontested. Local Bankr. R. 402.M. The 402.M statement "shall consist of short numbered paragraphs, including, within each paragraph specific references to the affidavits, parts of the record, and other supporting materials relied upon to support the facts set forth in that paragraph. Failure to submit such a statement constitutes grounds for denial of the motion." Id.

The Defendant filed a 402.M statement that partially complied with the requirements of Rule 402.M. It contained numbered paragraphs setting out uncontested facts with reference to parts of the record.

The party opposing a summary judgment motion is required by Local Rule 402.N to respond ("402.N statement") to the movant's 402.M statement, paragraph by paragraph, and to set forth any material facts that would require denial of summary judgment, specifically referring to the record for support of each denial of fact. Local Bankr. R. 402.N. The opposing party is required to respond "to each numbered paragraph in the moving party's statement" and make "specific references to the affidavits, parts of the record, and other

supporting materials relied upon." Local Bankr. R. 402.N(3)(a). Most importantly, "[a]ll material facts set forth in the [402.M] statement required of the moving party will be deemed admitted unless controverted by the statement of the opposing party." Local Bankr. R. 402.N(3)(b).

The Trustee has not complied with this rule and has failed to file any response within the time allowed by the Court. In his motion for leave to amend the complaint, which was filed beyond the briefing schedule set by the Court, the Trustee seeks to voluntarily withdraw Count I. This motion does not suffice for purposes of Rule 402. The Seventh Circuit has upheld strict application of local rules regarding motions for summary judgment. See Dade v. Sherwin-Williams Co., 128 F.3d 1135, 1140 (7th Cir. 1997); Feliberty v. Kemper Corp., 98 F.3d 274, 277-78 (7th Cir. 1996); Bourne Co. v. Hunter Country Club, Inc., 990 F.2d 934, 938 (7th Cir.), cert. denied, 510 U.S. 916 (1993); Schulz v. Serfilco, Ltd., 965 F.2d 516, 519 (7th Cir. 1992); Maksym v. Loesch, 937 F.2d 1237, 1240-41 (7th Cir. 1991). Because the Trustee failed to file the Rule 402.N statement within the allotted time, the facts set forth in the Defendant's Rule 402.M statement are deemed admitted.

Count I of the complaint asserts a cause of action against the Defendant under § 547(b). Section 547(b) allows the Trustee to avoid certain preferential transfers. A transfer of an interest of a debtor in property satisfies § 547(b) if it (1) was made to or for the benefit of a creditor, (2) was on account of an antecedent debt, (3) was made while the debtor was insolvent, (4) was made on or within 90 days before the date of the filing of the petition, or if the creditor was an insider, as here, within one year prior to the filing of the petition, and

(5) allowed the creditor to receive more than it would have under Chapter 7 of the Bankruptcy Code. See 11 U.S.C. § 547(b). The Trustee bears the burden of proving all the elements of § 547(b). In re Badger Lines, Inc., 140 F.3d 691, 698 (7th Cir. 1998).

The Trustee alleges that the Defendant received the transfer of $94,788.97 from the Debtor within one year before the filing of the bankruptcy case. However, pursuant to the unrebutted evidence submitted by the Defendant, the Court finds that the transfer from the Debtor to the Defendant occurred on December 5, 1997. See Defendant's Group Exhibits A, B and C and Affidavits of Nicholas Kachavos (Exhibit D) and George Kachavos (Exhibit E). The Debtor's bankruptcy petition was filed on December 11, 1998, more than one year subsequent to the December 5, 1997 transfer, and thus outside the applicable statutory period. Based on this evidence, the Court holds that the Trustee is unable to prove all of the requisite elements of § 547(b). Hence, the Court grants the Defendant summary judgment on Count I of the complaint.

B. Motion to Dismiss

In order for the Defendant to prevail on his motion to dismiss Count II of the complaint under Federal Rule of Civil Procedure 12(b)(6) and its bankruptcy analogue Rule 7012, it must clearly appear from the pleadings that the Trustee can prove no set of facts in support of his claims which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Colfax Corp. v. Illinois State Toll Highway Auth., 79 F.3d 631, 632 (7th Cir. 1996) (citation omitted); Meriwether v. Faulkner, 821 F.2d 408, 411 (7th Cir.), cert. denied, 484 U.S. 935 (1987). The Seventh Circuit has emphasized that "[d]espite their liberality on

pleading matters . . . the federal rules still require that a complaint allege facts that, if proven, would provide an adequate basis for each claim." Gray v. Dane County, 854 F.2d 179, 182 (7th Cir. 1988) (citations omitted).

Moreover, the Court must take as true all well pleaded material facts in the complaint, and must view these facts and all reasonable inferences which may be drawn from them in a light most favorable to the Trustee. See Northern Trust Co. v. Peters, 69 F.3d 123, 129 (7th Cir. 1995); Infinity Broadcasting Corp. of Illinois v. Prudential Ins. Co. of America, 869 F.2d 1073, 1075 (7th Cir. 1989); Corcoran v. Chicago Park Dist., 875 F.2d 609, 611 (7th Cir. 1989); Marmon Group, Inc. v. Rexnord, Inc., 822 F.2d 31, 34 (7th Cir. 1987). The issue is not whether the Trustee will ultimately prevail, but whether he has pleaded a cause of action sufficient to entitle him to offer evidence in support of his claims. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the sufficiency of the complaint, not to decide the merits of the case. Demitropoulos v. Bank One Milwaukee, N.A., 915 F. Supp. 1399, 1406 (N.D. Ill. 1996) (citing Gibson v. City of Chicago, 910 F.2d 1510, 1520 (7th Cir. 1990)).

Generally, federal notice pleading standards require only that the plaintiff give the defendant fair notice of the claims and the grounds for those claims. Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168 (1993), Conley, 355 U.S. at 47. Rule 8(a) of the Federal Rules of Civil Procedure requires only that a complaint identify the basis for jurisdiction and contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a). See also Bartholet v.

Reishauer A.G., 952 F.2d 1073, 1078 (7th Cir. 1992). A complaint must, however, allege facts sufficiently setting forth the essential elements of the cause of action. Lucien v. Preiner, 967 F.2d 1166, 1168 (7th Cir.), cert. denied, 506 U.S. 893 (1992). Mere conclusory allegations unsupported by factual assertions will not withstand a motion to dismiss. Briscoe v. LaHue, 663 F.2d 713, 723 (7th Cir. 1981), aff'd, 460 U.S. 325 (1983), cert. denied sub nom. Talley v. Crosson, 460 U.S. 1037 (1983).

Pursuant to Count II of the complaint, the Trustee seeks to avoid and recover the subject transfer of property from the Debtor to the Defendant pursuant to the UFTA. The UFTA provides in pertinent part:

> § 5. (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred, if the debtor made the transfer or incurred the obligation:
>
> (1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or
>
> (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
>
> (A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> (B) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.
>
> § 6. (a) A transfer made or obligation incurred by a debtor is

> fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

740 ILCS 160/5(a) and 160/6(a).

Sections 5 and 6(a) of the UFTA are analogous to 11 U.S.C. § 548(a)(1) and (2).[1] See Scholes v. Lehmann, 56 F.3d 750, 756 (7th Cir.), cert. denied, 516 U.S. 1028 (1995). Therefore, precedent under § 548(a)(1) and (2) is equally applicable to the Illinois version of the UFTA. Martino v. Edison Worldwide Capital (In re Randy), 189 B.R. 425, 443 (Bankr. N.D. Ill. 1995). The UFTA allows the Trustee to recover the transfer made by the Debtor under two theories: (1) if the Debtor made the transfer with actual intent to defraud a creditor; or (2) if the Debtor did not receive reasonably equivalent value in exchange for the transfer and was insolvent at the time of the transfer or became insolvent as a result of the transfer. Id. The UFTA speaks to two types of fraud -- "fraud in fact" and "fraud in law." Scholes, 56 F.3d at 756-57.

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[1] An important difference between § 548 and the UFTA is that § 548 authorizes avoidance of transfers made within one year before the bankruptcy filing. 11 U.S.C. § 548(a). Causes of action for fraudulent conveyances can be brought under the UFTA, however, within four years after the transfer was made. 740 ILCS 160/10(a). Because the transfer at issue was made more than one year before the bankruptcy filing, relief under § 548 is not available to the Trustee and he must and does rely on the UFTA.

"Fraud in fact" or actual fraud occurs when a debtor transfers property with the intent to hinder, delay or defraud his creditors. The moving party must prove a specific intent to hinder, delay or defraud. Lindholm v. Holtz, 221 Ill. App.3d 330, 334, 581 N.E.2d 860, 863 (2d Dist. 1991) (citing Gendron v. Chicago & NorthWestern Transp. Co., 139 Ill.2d 422, 437, 564 N.E.2d 1207, 1214-15 (1990)). In determining whether a transfer is made with actual intent to defraud, the UFTA sets forth several factors--also known as the "badges of fraud"-- from which an inference of fraudulent intent may be drawn. Section 5(b) of the UFTA sets forth the following indicia:

> (1) the transfer or obligation was to an insider;
> (2) the debtor retained possession or control of the property transferred after the transfer;
> (3) the transfer or obligation was disclosed or concealed;
> (4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
> (5) the transfer was of substantially all the debtor's assets;
> (6) the debtor absconded;
> (7) the debtor removed or concealed assets;
> (8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
> (9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
> (10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and
> (11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

740 ILCS 160/5(b). When these "badges of fraud" are present in sufficient number, it may give rise to an inference or presumption of fraud. Steel Co. v. Morgan Marshall Indus., Inc., 278 Ill. App.3d 241, 251, 662 N.E.2d 595, 602 (1st Dist. 1996) (citation omitted).

"Fraud in law," on the other hand, does not require any showing of fraudulent intent. Scholes, 56 F.3d at 757. The distinction between "fraud in fact" and "fraud in law" cases is derived from whether or not there was any consideration for the conveyance under attack. Second Nat'l Bank of Robinson v. Jones, 309 Ill. App. 358, 365, 33 N.E.2d 732, 736 (4th Dist. 1941). Lack of consideration or inadequate consideration for a debtor's conveyance, coupled with the existence or prospect of other unpaid creditors, triggers the "fraud in law" theory in which intent to hinder, delay or defraud is presumed from the circumstances. See Capitol Indem. Corp. v. J.H. Keller, 717 F.2d 324, 327 (7th Cir. 1983); Tcherepnin v. Franz, 475 F. Supp. 92, 97 (N.D. Ill. 1979); Wilkey v. Wax, 82 Ill. App.2d 67, 70, 225 N.E.2d 813, 814 (4th Dist. 1967).

Under § 6(a) of the UFTA, the elements of the cause of action are (1) the creditor's claim arose before the transfer, (2) the debtor made the transfer without receiving a reasonably equivalent value in exchange for the transferred property, and (3) the debtor either was insolvent at the time of the transfer or became insolvent as a result of the transfer. See Falcon v. Thomas, 258 Ill. App.3d 900, 909, 629 N.E.2d 789, 795 (4th Dist. 1994). Proof of actual fraudulent intent is not necessary. Id. Actual insolvency is not required. 258 Ill. App.3d at 911, 629 N.E.2d at 796 (citation omitted). The test is whether the conveyance directly tended to or did impair rights of existing creditors. Id.

The Court hereby grants the Defendant's motion to dismiss Count II of the complaint as it is completely devoid of any allegations of fraud whatsoever on the part of the Defendant. Further, the complaint does not specify under which portion of the UFTA the

Trustee proceeds. Count II of the complaint fails to allege sufficient facts to support a cause of action under either sections 5 or 6 of the UFTA. In fact, the complaint is devoid of any reference to these sections. Moreover, the Trustee has failed to allege any of the requisite elements under either section. To the extent actual fraud is the theory of recovery, fact specific allegations as required by Federal Rule of Bankruptcy Procedure 7009 and Federal Rule of Civil Procedure 9 are lacking in Count II of the complaint at bar. Neither the Court nor the Defendant should have to engage in a guessing game regarding whether the Trustee is alleging that the Defendant engaged in fraud in law or fraud in fact. This inadequate complaint fails to state the precise legal or factual basis on which the transfer should be avoided by the Trustee as fraudulent. Consequently, the Court grants the Defendant's motion to dismiss Count II of the complaint. The Court grants the Trustee's motion for leave to file an amended complaint with respect to Count II. The Trustee is hereby given fourteen days to file an amended Count II. The Defendant shall file an answer to the amended complaint fourteen days thereafter. This adversary proceeding is set for status on January 9, 2001 at 10:00 a.m.

IV. CONCLUSION

For the foregoing reasons, the Court grants the Defendant's motion to dismiss Count II of the complaint and grants the motion for summary judgment as to Count I of the complaint. The Court grants the Trustee leave to file an amended complaint as to Count II

within fourteen days hereof. The Defendant shall file an answer to the amended complaint fourteen days thereafter.

This Opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate order shall be entered pursuant to Federal Rule of Bankruptcy Procedure 9021.

ENTERED:

DATE: _____ _____

John H. Squires
United States Bankruptcy Judge

cc: See attached Service List

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: GEO CONTRACTORS, INC., Debtor.	)	Chapter 7 Bankruptcy No. 98 B 39931 Judge John H. Squires
SHELDON SOLOW, TRUSTEE, Plaintiff, v. GEORGE KACHAVOS, Defendant.	)	Adversary No. 00 A 00556

O R D E R

For the reasons set forth in a Memorandum Opinion dated the 5th day of December, 2000, the Court grants the motion of George Kachavos to dismiss Count II of the complaint and grants his motion for summary judgment on Count I of the complaint. In addition, the Court grants the Trustee's motion for leave to file an amended complaint with respect to Count II within fourteen days hereof. George Kachavos shall file an answer to the amended complaint fourteen days thereafter. This adversary proceeding is set for status on January 9, 2001 at 10 :00 a.m.

ENTERED:

DATE: _____

_____
John H. Squires
United States Bankruptcy Judge

cc: See attached Service List